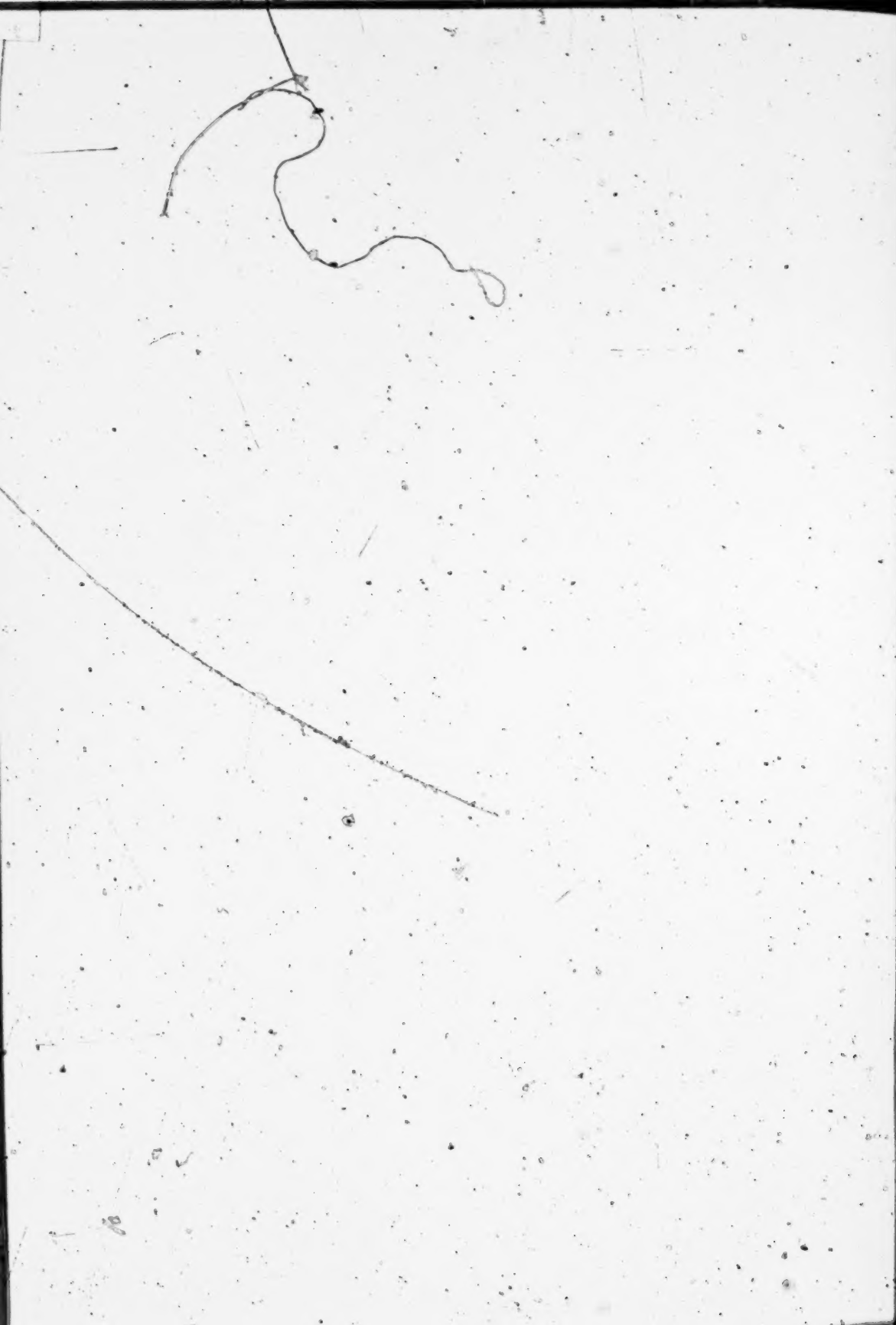

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 655

JOSEPH THOMAS MULLOY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 412 F. 2d 421.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1969, and a petition for rehearing was denied on August 29, 1969 (Pet. App. 12a). The petition for a writ of certiorari was filed on September 25, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the local board abused its discretion in refusing to reopen petitioner's classification as a result of his claim to conscientious objector status.

2. Whether, since a registrant whose claim to conscientious objector status is denied at the time of his original classification is entitled to appeal administratively from the denial as of right, and a registrant whose claim is denied following reopening and reconsideration of his classification can similarly appeal from the board's decision of the claim on its merits, it is a denial of due process to refuse the right of appeal to one whose request for reopening is denied because he has failed to present a *prima facie* case of entitlement to that status.

3. Whether the local board failed to consider petitioner's request for conscientious objector status fully, fairly, and competently.

STATEMENT

After a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted of failing to submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462 (R. 2; Tr. 203).[1] On April 8, 1968, he

[1] The record on file in the Clerk's office consists of the record of the criminal proceeding proper and that of a related civil proceeding (a pre-induction suit by petitioner for injunctive relief), which by stipulation (see Pet. 7-8) was treated as part of the record in the criminal case. (The district court denied the injunctive relief sought and, following petitioner's refusal

was sentenced to five years' imprisonment and fined $10,000 (R. 20). The court of appeals affirmed.

Petitioner registered with Local Board No. 47, in Louisville, Kentucky, on June 13, 1962. In June 1963, he completed and returned to the board his classification questionnaire, in which, under the caption "Conscientious Objector," he wrote "Does Not Apply." On November 22, 1963, he was classified II-S (college student deferment), and he remained in that classification until March 17, 1966. On the latter date, at his request, he was given a II-A (occupational deferment) classification, to expire in March 1967, on the basis of his employment by Appalachian Volunteers, Inc., an anti-poverty organization funded by the Office of Economic Opportunity (Pet. App. 2a; G.A. 2; G. Ex. 1).

On March 1, 1967, petitioner advised the local board by letter that he was still employed by Appalachian Volunteers, described and stressed the importance of his work, and requested renewal of his II-A deferment. Petitioner's supervisor similarly requested that the board allow petitioner to "con-

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to submit to induction and the commencement of the criminal prosecution, his appeal from that judgment was dismissed as moot (see Pet. 8).) "R." refers to the clerk's record of the criminal proceeding proper; "Tr." to the transcript of the criminal trial; and "G. Ex. 1" to petitioner's Selective Service file (Government Exhibit 1 at trial). Most of the relevant portions of the record appear in the Appendix to the petition for a writ of certiorari or in one or the other of the appendices to the briefs in the court of appeals. We are accordingly lodging herewith copies of the two latter appendices. "A." refers to petitioner's appendix; "G.A." to the government's.

tinue his vital role" in the organization's program. On May 11, 1967, in accordance with its policy of limiting deferment in such cases to one year, the board denied the requests and reclassified petitioner I-A. Petitioner was advised of the reclassification on May 16, 1967 (Pet. App. 2a; G.A. 2-5; G. Ex. 1).

On May 17, 1967, petitioner was ordered to report for a pre-induction physical examination on June 26, 1967. On May 23, 1967, the local board received a letter from petitioner dated May 19, 1967, addressed to "Appeals Board, Selective Service, Local Board No. 47," in which he said that the letter was "an official appeal to you to review and reconsider my request for an occupational deferment." Noting that he had previously been classified II-A on the basis of his work for Appalachian Volunteers, petitioner wrote that he was more deeply involved than ever in his work and that he felt that at least one more year would be needed to achieve satisfactory results. Due to the temporary absence of the clerk of the local board, no immediate reply was made to that letter. On June 26, 1967, petitioner was examined and found qualified for induction (Pet. App. 2a; G.A. 6-7; G. Ex. 1).

On July 3, 1967, the clerk of the local board wrote petitioner that the board had not overlooked his letter of May 19 and inquired whether petitioner wished the board to "first review your file and then forward [it] to the Appeal Board" or whether he desired merely that it be forwarded to the appeal board. On July 10, 1967, petitioner replied that he did not fully understand the procedures to which the clerk

had referred. Noting that he had been reclassified I-A in May 1967, he said that he had "appealed" that classification "on the grounds of occupation" and "asked for a renewal of" his II-A deferment. He requested the board to "do what is necessary to reconsider my classification" (Pet. App. 2a; G.A. 7-8).

On July 17, 1967, petitioner was ordered to report for induction on August 17, 1967. On July 20, 1967, he wrote the local board that he had been advised by counsel that the order to report for induction was invalid because he had had a timely appeal outstanding since May 23, 1967. He requested that the induction order be canceled, that the appeal be forwarded to the appeal board, and that he be granted a personal appearance before the local board. The board denied his request for a personal appearance because the request had not been made within thirty days after the notification to him of his I-A reclassification, as required by 32 C.F.R. 1624.1(a). On July 25, 1967, although petitioner's time within which to appeal had expired, the local board, because of the apparent misunderstanding as to whether petitioner had intended his May 19 letter to be an appeal or simply a request for reconsideration by the local board, canceled the order to report for induction and forwarded the file to the appeal board. On August 16, 1967, the appeal board, by a 5-0 vote, classified petitioner I-A (Pet. App. 3a; G.A. 10-11, 12-13, 39; G. Ex. 1).

On September 5, 1967, petitioner advised the local board by letter that he had been arrested on August 12 and charged with sedition against the State of

Kentucky; that the case was then pending in the United States District Court for the Eastern District of Kentucky, at Lexington (in a proceeding to enjoin the State prosecution; see Pet. 5 and *McSurely* v. *Ratliff*, 282 F. Supp. 848 (E.D. Ky.)); and that he would keep the board advised of developments. On September 21, 1967, petitioner was again ordered to report for induction, on October 16, 1967. On October 9, 1967, petitioner advised the board that his "legal complications" had not been resolved; that he was "still under $5,000 bond" to the federal court in Lexington; that the decision of the federal court (enjoining the State prosecution) still might be appealed, in which event the case "could drag on for several more months"; and that in addition he was under bond in the amount of $250 to a court in Pike County, Kentucky, on a still-pending charge relating to a deadly weapon. He accordingly asked the board to cancel the induction order. On October 12, 1967, the board canceled the induction order and advised petitioner that since he was "under the jurisdiction of the Court" he would be considered for a IV-F classification. (Pet. App. 3a; G.A. 15, 17, 19).

On October 17, 1967, petitioner advised the local board that after much thought he had come to the conclusion that he was a conscientious objector and asked the board to send him the special form for claiming that status (Pet. App. 30a-31a). The board sent him the Special Form for Conscientious Objector (SSS Form 150), and he completed and returned it on October 30 (Pet. App. 20a, 21a-29a).

Petitioner stated in the form—by signing a printed declaration which so asserted—that he was conscientiously opposed by reason of religious training and belief to participation in war in any form (Pet. App. 21a; G. Ex. 1). He said that he believed in a Supreme Being; that the belief involved duties superior to those arising from any human relation; that his religious training had taught him that it was against God's law to kill; and that he believed in Jesus' message of love for all mankind (Pet. App. 21a, 25a). In response to the inquiry as to how, when, and from whom he had received the training and acquired the belief upon which his claim was founded, he said that he had been born and reared a Catholic; that, after going through a religious crisis in college in which he had fancied himself an agnostic and an atheist, he had returned to the Catholic Church; and that he had been greatly influenced by the writings of Thomas Merton, who, he said, was non-violent, but that, whereas Merton was a hermit and a contemplative, petitioner was an activist and an organizer, determined to right the injustices of the world. He had learned in his work in the Appalachians of the significance of love and understanding and the futility of force and violence; that too many poor people had been used and walked on by the power-hungry courthouse gangs; that there was an urgent need for the poor to become organized and for the rich to be educated; and that this must be done in a non-violent way. Although as a young man he had not been taught to be against the use of violence as such, he said, he had been taught not to kill and to love all

men. He concluded: "This coupled with my adult experience has brought me to my present position. It was only through and after my adult experience that I became a CO" (Pet. App. 22a, 25a-28a).

In response to the form's inquiry as to the circumstances, if any, under which he believed in the use of force, petitioner said that he believed "in the force of non-violence" (Pet. App. 22a, 28a). Asked to describe the actions and behavior in his life which most conspicuously demonstrated the consistency and depth of his religious convictions, he wrote that he was spending his life non-violently working among the poor; that he had once successfully urged non-violent methods while helping to organize resistance to strip mining; that as a consequence of that appeal bloodshed had been avoided in a tense situation; that he had supported peace demonstrations to end the conflict in Vietnam; and that he had written letters to his Senators and signed a petition to the President urging a negotiated peace in Vietnam (Pet. App. 22a, 28a). In reply to an inquiry as to when and where, if at all, he had given public expression to the views relied upon as the basis of his claim to being a conscientious objector, he said that he had trained groups of VISTA volunteers for work in Appalachian communities; that he had on several occasions told such groups that non-violent change was what was needed in Eastern Kentucky; that he had led discussions concerning non-violent organizing techniques; and that he had testified in the federal proceeding arising out of the sedition charges against him and others that he did not advocate the violent

overthrow of any government (Pet. App. 22a, 28a). Asked to describe carefully the creed or official statements of the religious sect to which he belonged in relation to participation in war, he wrote that Pope Paul had said before the United Nations: "No more war, no never again. If you wish to be brothers let the weapons fall from your hands" (Pet. App. 23a).

Reverend William F. Browne, pastor of a church to which petitioner said he was spiritually close, and whose name petitioner submitted to the board as one who could give information as to the sincerity of his professed convictions against participation in war, advised the board by letter that petitioner was a person of moral integrity and veracity; that because petitioner's "personal conscience finds that participation in war is incompatible with his moral convictions, * * * military service would do violence to his conscience"; that the Catholic Church had always maintained that participation in a just war is morally defensible but at the same time had insisted that each individual must follow his own conscience; and that in view of the Church's defense of the inviolability of the individual's conscience he supported petitioner's request to be classified as a conscientious objector (Pet. App. 23a, 24a, 35a-36a).

Thorsten Horton, a friend of petitioner who had directed a field study project in "Southern Appalachia," and whose name petitioner also gave the board as one who could vouch for the sincerity of his convictions, wrote to the board that he had observed in petitioner "genuine Christian love and concern for the Christian brotherhood of Man"; that petitioner

could not have endured the persecution he had received arising out of his recent court experience in the sedition case if he had not had "faith in the goodness of Man"; and that in a recent encounter between a coal company and an organization called the "Appalachian Group to Save the Land and the People," petitioner had demonstrated his belief in non-violence by persuading members of the group to leave their arms at home, thus averting "what could have been a terrible waste of human life" (Pet. App. 24a, 37a-38a).

Carl Braden, another friend of petitioner whose name he submitted as a reference, advised the board by letter that petitioner was a conscientious person who was working hard to help bring about a better world for the poor in the mountains of Kentucky; that petitioner believed that peaceful action is the way to solve problems and that war only makes them worse; and that he had told Braden many times how he felt about this and that it was good that he felt such responsibility to his fellow man (Pet. App. 24a; G.A. 20-21).

Robert Mulloy, petitioner's brother, wrote to the board that while he disagreed with petitioner's unwillingness to bear arms he believed petitioner was sincere in his feelings, and said that petitioner had maintained this position for a number of years (G.A. 25).

In his letter transmitting the completed Form 150 to the board, petitioner advised that he had been informed by his attorney that he was "still under bond to the Federal Court in Lexington" and he re-

quested "a personal interview * * * to discuss my appalachian [*sic*]" (G.A. 24). The board replied that while petitioner's appeal rights and the time within which to seek a personal appearance as of right had both lapsed, it was granting him a personal appearance as a matter of "courtesy" (G.A. 23).[2]

On November 9, 1967, petitioner appeared before the board for the courtesy interview and the board received and placed in his file the several letters submitted in support of his request for conscientious objector status. During the interview, which lasted ten or 15 minutes, petitioner was given full freedom to express himself as to why he thought he should not be drafted (Pet. App. 45a; A. 42a, 44a; Tr. 162-163). His principal statement, according to the recollection of the chairman, J. Allen Sherman, "was in relation to his work and the importance of his work in the mountains of Eastern Kentucky" (A. 42a). He presented, Sherman recalled, "the same argument that he'd made before on his occupational deferment and he didn't have any conscientious objection statement that we felt would merit a consideration" (A. 44a-45a). Board member Wolking's "only recollection" of petitioner's remarks was, similarly, that he

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[2] Although petitioner's time within which to request a personal appearance as of right, under 32 C.F.R. 1624.1(a), had expired, authority for the granting of a "courtesy" appearance is to be found, as the court of appeals noted (Pet. App. 3a-4a), in 32 C.F.R. 1625.1(c), under which local boards are directed to "keep informed of the status of classified registrants" and are authorized to question registrants and take "other steps" to that end.

"felt like his work in Appalachia was very important and was at least important to him and he felt like he should be made a Conscientious Objector or should have Conscientious Objector status because of that * * *" (A. 61a).[3] At the conclusion of petitioner's statement the chairman asked him if there was anything additional he cared to say and, when petitioner indicated there was not, the interview terminated (A. 42a; Tr. 156-157, 162-163). A résumé of petitioner's statements, prepared by the clerk and placed in his file, states that petitioner "advised that he

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[3] Petitioner testified that the atmosphere at the interview was polite but tense; that there were "hard stares" from the members and he was asked "belligerent" questions; that among the questions were whether he was not claiming to be a conscientious objector "just * * * to get out of the draft" and whether he felt any obligation to serve his country; that he answered "no" to the first question and, to the second, that he felt he was already serving his country in the work he was doing in Eastern Kentucky. He testified that after he had explained the development of his conscientious objector beliefs he was asked if he felt that his work was important; that he answered that he did think so; and that, in reply to an inquiry by a member as to whether he could be replaced, he said that that would be difficult due to the nature of his work (A. 69a-71a).

Chairman Sherman testified that few if any questions were asked at the interview; that he did not recall what the questions were; but that he was sure petitioner was not asked if he had filed the C.O. claim just to get out of the draft or if he felt any obligation to serve his country (A. 42a-43a; Tr. 178). Member Downes did not recall either of those questions being asked, did not remember asking any questions himself, and had the impression that petitioner "did all of the talking" (A. 56a; Tr. 99-100). Member Wolking, the only other member present (A. 66a), did not remember asking any questions himself and had no recollection of any other member doing so (A. 60a-61a).

was claiming a C.O. classification because he had learned through experience and did not until later in life realize the importance of now believing as he did" and that he "felt that military service would interrupt his work and there would be no one else to take his place" (G.A. 28). The résumé further indicates that petitioner advised the board that he was under bond to the federal court as long as the time for appeal in the case arising out of the sedition charge was running; that the clerk was instructed to write to the federal court to inquire concerning the appeal and the bond; and that until such time as a reply was received the board "would not consider him as a C.O." (G.A. 28-29). The minute entry in petitioner's file reflecting the action taken on November 9 states that "classification was not re-opened" (Pet. App. 20a).

On November 12, 1967, petitioner wrote to the board (Pet. App. 32a-34a):

> I have been thinking about the short interview I had with you all last week. It doesn't seem to me that all the points were covered that should have been and that I was not able to fully express my position of conscience.
>
> * * * * *
>
> This brings us to the war in Vietnam and my draft situation.. I do not question individual integrety [*sic*] or your right by law to do what you do. I do however believe that every citizen has the duty of dissent, even resistance, regarding acts which violate his conscience.
>
> I told you I felt that I was serving my country's needs here in Pike County. That was no

frivolous statement. The problems are too great to be ignored any longer and no one should be sent to another country as long as we are in the mess we are in. Since I believe my country's course to be wrong in Vietnam, I feel that I would be serving my country's best interest, now and in the future generations, to follow my conscience.

I feel that you are going to try to draft me anyway, regardless of my feelings. I have not made up my mind as yet. If I decided to go into the Army I will of course do everything in my power to teach my fellow soldiers the truth about Vietnam and Non-violent principles. I will actively organize resistance. If I choose not to go into the Army I will resist induction and make the biggest stink about it possible. I must do this to bear witness to my beliefs and to cause my fellow citizens to think.

* * * * *

On December 2, 1967, petitioner advised the board that he had been "fired" by Appalachian Volunteers for claiming conscientious objector status and for stating that he would refuse induction if ordered. He said that he felt bad about being fired, but that a person must have the "conviction of his beliefs," and he asked the board to consider his loss of employment as a public demonstration of his C.O. convictions (G.A. 29).

On December 6, 1967, a letter (written several weeks previously) from the clerk of the federal court to the Kentucky State Selective Service Headquarters advising that petitioner had recently been a plaintiff in a civil action in the court but that the clerk had

no information of his ever having been a defendant in a matter in that court, civil or criminal, was received by the local board (G.A. 30). On January 3, 1968, petitioner advised the local board that the sedition charge against him had been dropped and the bond released (G.A. 31).

On January 11, 1968, the local board, after considering "[a]ll information in file * * * including claim of Conscientious Objector," voted 4-0 not to reopen petitioner's classification. "All Members present," according to the minute entry, "felt this information did not warrant re-opening" of the I-A classification (Pet. App. 20a). On January 21, 1968, following notification of the board's action, petitioner wrote to the board: "I appeal your failure to reclassify me I-O. I consider the interview in November a re-opening of my case" (A. 30a-31a). On January 23, 1968, the board replied that the personal appearance it had granted petitioner had been merely a matter of "courtesy", since his time for a personal appearance as of right had expired, and that the board did not consider the interview a reopening (A. 32a). On the same day, petitioner was ordered to report for induction on February 23, 1968. Petitioner reported as directed, but refused to submit to induction (Pet. App. 20a).

At trial petitioner called all of the members of the local board and questioned them as to the basis of the board's decision not to reopen his classification (Pet. App. 39a-40a, 42a-54a; A. 41a-49a, 52a-68a, 74a-78a). Chairman Sherman testified in relevant part (Pet. App. 39a-40a):

> Taking everything that he—he did not make out—his claim was principally on his job, the work he was doing, and that was what he was attempting to do at the time he was down there personally.
>
> Now, I went over his 150 Form. What's in it, now, I couldn't tell you. * * * His claim, taking everything, assuming everything that he said down there at that time to be so, he still did not make out a case for a conscientious objection and, therefore, we saw no reason to reopen the case, because it wasn't there.
>
> * * * * * *
>
> The action taken is the conclusion we came to, and it was based on all the information we had, what he had furnished us, the letters he had sent us with his 150 form and the information that he had given when he appeared in person.

Member Wolking testified that the board had assumed that petitioner was sincere, but that nonetheless the evidence was insufficient to justify giving him C.O. status, since his claim was grounded essentially on his work in Eastern Kentucky (A. 62a-63a; Pet. App. 49a, 50a-51a). The other board members, Downes and Rickert, were not questioned as to whether they regarded or assumed all of petitioner's statements to the board to be true, or his claim a sincere one, and they gave no testimony pertinent to those points. All of the members testified that they felt they had given full, fair, and unbiased consideration to petitioner's case (Tr. 110, 115-116, 128-129, 132-133, 144-145, 178).

ARGUMENT

1. Petitioner contends that the new information which he presented to the local board with his request to reopen his classification (the representations made in the Form 150 and in the accompanying letters) constituted a *prima facie* showing that he was entitled to conscientious objector status; that the board was consequently required to reopen his classification, evaluate the new information, and reclassify him (to I-O or again in I-A); and that, by refusing to reopen, the board improperly precluded him from taking an administrative appeal from its refusal to grant him the classification sought (Pet. 9-21).[4] He relies on the principle of such cases as *United States* v. *Freeman*, 388 F. 2d 246 (C.A. 7), *Miller* v. *United States*, 388 F. 2d 973 (C.A. 9), and *Davis* v. *United States*, 410 F. 2d 89 (C.A. 8), that a request to reopen can properly be denied only where the new information relied on is insufficient on its face to justify a change of classification, and that a board may not, under the guise of refusing to reopen, evaluatively weigh the new information "against

[4] Under the regulations, if the board reopens it must again classify the registrant "in the same manner as if he had never before been classified" and the registrant has the same right to appear personally before the board or to take an administrative appeal, or both, as in the case of an original classification, even though he is again placed in the category he was in before the reopening (32 C.F.R. 1625.11, 1625.13). If the board declines to reopen, it simply advises the registrant by letter that the submitted information does not warrant reopening (32 C.F.R. 1625.4), and there is no right of personal appearance or of appeal.

other elements in the situation" and on the basis of that appraisal determine that it is not entitled to "credence as fact" (*Miller*, *supra*, 388 F. 2d at 975).

We assume, *arguendo*, that despite the rather vague character of the asserted religious basis of his claimed conscientious objection to participation in war in any form, the new information which petitioner presented in the representations made in the Form 150 and the accompanying letters (*supra*, pp. 7-11) did present a *prima facie* showing that he met the statutory conscientious objector standard (50 U.S.C. App. (Supp. IV) 456(j)). We submit, nevertheless, that the board was not bound to reopen his classification automatically on the basis of that showing, and that, in the particular circumstances of this case, the board was warranted in declining to do so.

32 C.F.R. 1625.2 provides that the local board "may" reopen a registrant's classification, upon his written request, if the request "is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification * * *." Thus, as the court of appeals noted (Pet. App. 6a), the regulation gives *discretion* to the local board to reopen in the circumstances stated—it does not require that it do so.[5] This discretion, like any legally conferred discretion, may of course not be arbitrarily exercised. Cf. *Townsend* v. *Zimmerman*,

[5] If the board is of the opinion that the newly alleged facts, if true, would *not* justify a change of classification (or that no new facts are presented), the board is *prohibited* from reopening (32 C.F.R. 1625.4).

237 F. 2d 376, 377 (C.A. 6); *United States* v. *Vincelli*, 215 F. 2d 210, 212-213 (C.A. 2); *United States* v. *Bartelt*, 200 F. 2d 385, 389 (C.A. 7); *Smith* v. *United States*, 157 F. 2d 176, 181 (C.A. 4), certiorari denied, 329 U.S. 776. But it is important to stress that it is authority that the regulation confers; it does not impose a command, even where a *prima facie* case for reclassification is made out.

Where a request to reopen is accompanied by allegations of new facts which, if true, would justify a change of classification, *and the board has no reason to question the truth or sincerity of the representations*, reopening concededly is required. Refusal to reopen would be unreasonable in those circumstances and hence an abuse of discretion. That was the situation in a number of the cases cited by petitioner. *E.g.*, *Howze* v. *United States*, 409 F. 2d 27 (C.A. 9); *Petrie* v. *United States*, 407 F. 2d 267 (C.A. 9); *Robertson* v. *United States*, 404 F. 2d 1141 (C.A. 5). But where, as in this case, the board has grounds for questioning the truth or sincerity of the allegations relied on, the board need not automatically reopen. Acting under the investigative powers granted by 32 C.F.R. 1625.1(c), the board, as the court below properly noted (Pet. App. 7a), can scrutinize the representations and inquire further—as part of the process of determining whether, in the exercise of its discretionary authority, reopening would be appropriate.

That is what the board did here. It granted petitioner a courtesy interview so that it could hear from him personally concerning the depth of his claimed

C.O. convictions. At the interview petitioner's principal statement, according to the recollection of the chairman, concerned the importance of his work in Appalachia. He presented, the chairman said, "the same argument that he'd made before on his occupational deferment and he didn't have any conscientious objection statement that we felt would merit a consideration" (*supra*, p. 11). Similarly, Board member Wolking's only recollection of petitioner's remarks was that he "felt like his work in Appalachia was very important" and that he "should have Conscientious Objector status because of that * * *" (*supra*, p. 12). The clerk's résumé of the interview similarly states that petitioner "felt that military service would interrupt his work and there would be no one else to take his place" (*supra*, p. 13). A few days later, in his letter of November 12, 1967, petitioner advised the board that he had not yet "made up [his] mind" whether he would "go into the Army" in the event the board rejected his claim; that if he decided to go in he would do what he could to teach his fellow soldiers the truth about Vietnam and the principles of non-violence; and that if he decided not to do so he would resist induction and make as big a stink about the matter as possible (*supra*, pp. 13-14).

Against this background, the board could not only legitimately wonder whether these were the remarks, and this was the attitude, of an actual conscientious objector; it could also properly evaluate the allegations made in the Form 150 in the light of those substantially contemporaneous statements of petitioner himself, and conclude that no *prima facie* case,

within the meaning of the pertinent decisional law, had been presented. In determining whether a *prima facie* basis for reopening had been made, the board could, in other words, properly discount petitioner's previous written representations by his substantially contemporaneous statements made at the interview and in the subsequent November 12 letter. At least to the extent that the board's refusal to reopen was based on the foregoing considerations—and the record, it is submitted, fairly reflects that they were important if not indeed the decisive bases of the board's action—the board did not engage in an evaluative weighing of an otherwise sufficient *prima facie* showing within the meaning of the decisions relied on by petitioner.[6] What the board essentially did was to determine that the representations of the Form 150 and its accompaniments, viewed in the light of the contemporaneous statements, did not amount to such a *prima facie* showing as would justify reopening.

Petitioner argues, however, that the board "accepted everything [he] said as true and assumed that he was sincere in his beliefs" (Pet. 11-12, 13, 21, 26). The record, we submit, will not bear that interpretation. The testimony on which petitioner relies has been referred to previously (*supra*, pp. 15-16).

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[6] For example, in *Miller* v. *United States*, *supra*, the board weighed the registrant's conscientious objector claim against the fact that he had in the past sought to enlist in a reserve program. Finding the actions inconsistent, the board concluded that the claim was insincere (388 F. 2d at 975). It was *that* sort of evaluative weighing without reopening that the court in that case found improper.

To be noted, in the first place, is that only two members of the board—Chairman Sherman and Member Wolking—were questioned on the point in issue. The other members—Downes and Rickert—said nothing germane. When the statement of the chairman is carefully examined, it appears that all he relevantly meant to say was that "assuming everything that [petitioner] said down there at that time [*i.e., at the interview*] to be so, he still did not make out a case for a conscientious objection"—because "his claim [at the interview] was principally on his job, the work he was doing * * *." Nothing in the chairman's testimony can be read as meaning that he accepted the sincerity of *everything* that petitioner said—including the representations in the Form 150. Member Wolking's testimony is at best ambiguous. In its context, we believe that his statement, "We assumed he was sincere, that's right," was meant to convey no more than that the members assumed petitioner was sincere in his remarks at the interview about "the importance of his work in Appalachia" (Pet. App. 49a). The assumption that these two members meant to say that they assumed petitioner was sincere in his *representations that he was a conscientious objector* is simply not reconcilable with their testimony as a whole (see *supra*, pp. 11-12). Moreover, if they assumed petitioner was sincere in his claim to be a conscientious objector, it would have been entirely inconsistent, and indeed inexplicable, for them to vote not to reopen.[1]

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[1] Petitioner, noting the court of appeals' comment that his November 12 letter (erroneously referred to as his letter of

2. There is no merit to petitioner's contention that since a registrant whose claim to conscientious objector status is denied at the time of his original classification is entitled under the regulations to appeal administratively from the denial as of right, and since a registrant whose C.O. claim is denied following reopening and reconsideration of his classification can similarly appeal from the board's decision of the claim on its merits (see note 4, *supra*), it is discriminatory and a denial of due process to

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November 17) "indicated rather clearly that his objection to serving in the Armed Forces was based on essentially political, sociological or philosophical views and his conscience rather than on religious training and belief" (Pet. App. 8a), argues that the court erroneously failed to recognize that if a registrant's objection to participation in war is based partly on religious training and belief and partly on other factors he is nevertheless entitled to C.O. status (Pet. 22-26). We do not dispute the proposition that a conscientious objection to war that proceeds partly on religious and partly on non-religious grounds meets the statutory test. The point, however, is inapposite. *The board* here did not reject petitioner's claim because it concluded that it was based on non-religious as well as religious considerations. The evident basis on which it rejected the claim was that, as appears from the earlier discussion and as the court of appeals' opinion generally indicates, it concluded that on the basis of petitioner's own *prima facie* showing the claim was not sincerely and genuinely entertained. For the same reason, the question whether Congress can constitutionally limit the conscientious objector exemption to those whose opposition to participation in war is based upon religious training and belief (Pet. 26-28) is not presented on the instant record. There is therefore no occasion for the Court to defer action on the present petition until after it decides *United States* v. *Sisson*, pending on direct appeal, No. 305, this Term, and *Welsh* v. *United States*, No. 76, this Term, in which certiorari was granted on October 13, 1969.

refuse the right of appeal to one who, like petitioner, is denied reopening because he has failed to present a *prima facie* case of entitlement to that status (Pet. 28-31). It is not unreasonable to require that a registrant who first advances a claim to conscientious objector status after he is originally classified make a *prima facie* showing that he is entitled to that classification before the right of administrative appeal, with its attendant delays, should accrue. *Klubnikin* v. *United States*, 227 F. 2d 87, 90-91 (C.A. 9), certiorari denied, 350 U.S. 975; *Boyd* v. *United States*, 269 F. 2d 607, 611 (C.A. 9). Nothing in *Miller* v. *United States*, 388 F. 2d 973 (C.A. 9), relied on by petitioner, is to the contrary. All that *Miller* relevantly held was that it would be impermissibly discriminatory for the regulations to be read as permitting a board to distinguish—in deciding whether to grant reopening, with its attendant right to appeal—between "prima facie situations of legal equality" (388 F. 2d at 976-977).

3. Nor is there merit to petitioner's claim that the board failed to consider his request for conscientious objector status fully, fairly, and competently (Pet. 31-35). Particularly since his appearance before the board was a "courtesy" interview only, *i.e.*, one that need not have been granted at all, it is immaterial that one of the four members did not attend it. And it is not relevant that the interview lasted only ten or 15 minutes. As noted previously, petitioner was given complete freedom to say all that he wished at the interview. While Member Downes only

"scanned" petitioner's Selective Service file prior to the interview and did not remember whether he read the completed Form 150 at that time (Pet. App. 43a), he recalled reading it at or prior to the meeting of January 11, 1968, at which the vote on reopening was taken (Tr. 108-109). Downes' acknowledgment that the only occasion he would have had to consider the file would have been during or prior to a board meeting and that he never took the file home to "study it" (Pet. App. 47a) does not indicate that the unpaid board member's consideration of petitioner's case was superficial or constitutionally inadequate. That some of the members' answers to defense counsel's inquiries testing their knowledge of the law and the regulations reflected occasional misunderstandings likewise does not show that their handling of petitioner's case failed to meet due process standards. As noted previously, all of the members testified that they felt they had given the case full, fair, and unbiased consideration.[8]

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[8] In addition to the contentions urged in the present petition, petitioner seeks to join in the petition for a writ of certiorari in *Pratt* v. *United States*, No. 666, this Term (see p. 1 of the latter petition). Our response to the contentions which petitioner thus seeks to adopt by reference is contained in our separate brief in opposition filed in that case.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1969.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 369246 339